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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THOMAS FIORE, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

TOWNSEND FARMS, INC., an Oregon
corporation; PURELY POMEGRANATE, INC.,
a California corporation; and DOES 1 through
100, inclusive,

Defendants.

CASE NO. 2:13-cv-1729

**NOTICE OF REMOVAL OF CIVIL CTION
UNDER 28 U.S.C. §§ 1332(D), 1441, 1446 &
1453 (CLASS ACTION FAIRNESS ACT)
AND 28 U.S.C. § 1332(A) (DIVERSITY)**

PURELY POMEGRANATE, INC. ("PPI"), by and through its counsel of record, hereby
removes to this Court the state-court action described herein.

Federal diversity jurisdiction exists under the Class Action Fairness Act ("CAFA"), 28
U.S.C. § 1332(d), because this case is a "class action" under CAFA, the CAFA diversity of
citizenship requirements are fully met, and the matter in controversy exceeds the sum or value of
\$5,000,000, exclusive of interest and costs. Federal diversity jurisdiction also exists under 28 U.S.C.
§ 1332(a) because all current parties to the action are completely diverse and the amount in
controversy exceeds \$75,000. PPI states the following grounds for removal:

INTRODUCTION

1. On August 15, 2013, Plaintiff filed a First Amended Complaint against Townsend Farms, Inc. and PPI in the District Court, Clark County, Nevada, styled “*Thomas Fiore, individually and on behalf of all others similarly situated, Plaintiff, vs. Townsend Farms, Inc., an Oregon Corporation; Purely Pomegranate, Inc., a California Corporation; and Does 1 through 100, inclusive, Defendants,*” Case Number A-13-683473-C (the “Class Action Complaint”). (See Exhibit 1 attached hereto.) At the time of filing this Notice of Removal, *Fiore* was still pending in the District Court, Clark County, Nevada. See 28 U.S.C. § 1441(a).

2. The Class Action Complaint was served via personal service on PPI on August 21, 2013. (See Exhibit 2 (Summons).)

3. True and correct copies of the Class Action Complaint, Summons and all other documents as served on PPI in this action are attached hereto as Exhibits 1, 2, and 3 (all papers served on PPI). See 28 U.S.C. § 1446(a).

4. When a plaintiff files suit in state court but could have invoked the original jurisdiction of the federal courts, the defendant may remove the action to federal court. 28 U.S.C. § 1441(a); *Sparta Surgical Corp. v. Nat’l Ass’n of Securities Dealers*, 159 F.3d 1209, 1211 (9th Cir. 1998).

5. This Court has original jurisdiction over this action under CAFA, 28 U.S.C. §§ 1332 *et seq.*, and it may be removed from the District Court, Clark County, Nevada, to this Court pursuant to 28 U.S.C. §§ 1332(d), 1446 and 1453(b), because it is a “class action” comprised of at least 100 members in the aggregate, minimal diversity of citizenship exists between the parties, and the amount in controversy exceeds the sum of \$5,000,000, exclusive of interest and costs.

6. This action may also be removed to this Court pursuant to 28 U.S.C. § 1332(a) and 1441(b) because the parties are citizens of different states and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

THE REMOVED ACTION IS A “CLASS ACTION” SUBJECT TO CAFA REMOVAL

7. This case is a “class action” as defined in 28 U.S.C. section 1332(d)(1)(B) and is therefore removable under the provisions of CAFA. (*See, e.g.*, Ex. 1 ¶¶ 6-21, Prayer ¶¶ (1)-(3).)

8. In their Class Action Complaint, Plaintiff brings this action “as a class action, pursuant to NRCP 23, on behalf of all persons who were exposed to HAV [hepatitis A virus] as a direct and proximate result of 1) consumption of the Product or 2) exposure to, or close proximity with, persons who were exposed to the Product, and (3) thereafter received vaccinations against HAV or a prophylactic dose of IG [immune globulin], or underwent serology or other diagnostic testing procedures to determine whether exposure to the Defendants’ contaminated product had resulted in infection by HAV.” (Ex. 1 ¶ 8.)

9. Rules 23(a) and (b)(3) of the Nevada Rules of Civil Procedure authorize actions to be brought by “one or more” persons who may “sue or be sued as representative parties on behalf of all” and are materially identical to Federal Rules of Civil Procedure 23(a) and (b)(3). Thus, actions alleged under Nevada Rules of Civil Procedure 23(a) and (b)(3) qualify as “class actions” for removal jurisdiction under CAFA because they “authoriz[e] an action to be brought by 1 or more representatives as a class action.” *See* 28 U.S.C. § 1711(2).

10. Accordingly, the Class Action Complaint is a “class action” under CAFA. *See* 28 U.S.C. § 1332(d)(1)(8).

PLAINTIFF AND DEFENDANTS ARE CITIZENS OF DIFFERENT STATES

11. Complete diversity of citizenship exists between a member of the proposed class of Plaintiffs and at least one defendant, as required by CAFA. 28 U.S.C. § 1332(d)(2).

12. Both at the time this action was filed and at the time of removal, Townsend Farms, Inc. was, and still is, a citizen of the State of Oregon; it is an Oregon corporation with its principal place of business in Fairview, Oregon. (*See, e.g.*, Ex. 1 ¶ 2; Request for Judicial Notice in Support of Notice of Removal, filed herewith (“RJN”), Ex. 1 (Townsend Farms, Inc. 2012 Annual Report).)

13. Both at the time this action was filed and at the time of removal, PPI was, and still is, a citizen of the State of California; it is a California corporation with its principal place of business in

Dana Point, California. (*See, e.g.*, Ex. 1 ¶ 3; Declaration of Brian Klein in Support of Notice of Removal of Civil Action, filed herewith, ¶ 2.)

14. The named Plaintiff, Thomas Fiore, is a citizen of the State of Nevada. (*See* Ex. 1 ¶ 1.) Among other things, Plaintiff alleges that he “resides in Las Vegas, Clark County, Nevada.” (*Id.*)

THE AMOUNT IN CONTROVERSY EXCEEDS \$5,000,000

15. CAFA provides for original jurisdiction for “any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.” 28 U.S.C. § 1332(d)(2). Unlike traditional review of the amount in controversy for claims asserted by individuals, in class actions, CAFA requires that claims of class members be aggregated:

In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)(6).

16. The amount in controversy is determined by evaluating the plaintiff’s complaint and the record as a whole. *See Lewis v. Verizon Communications, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010); *Lim v. Helio, LLC*, 2012 U.S. Dist. LEXIS 12871, at *6 (C.D. Cal. Feb. 2, 2012). The amount in controversy is “simply an estimate of the total amount in dispute, not a prospective assessment of defendant’s liability” or “proof of the amount the plaintiff will recover.” *Lewis*, 627 F.3d at 400 (quoting *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008)).

17. PPI denies all of plaintiff’s allegations and specifically denies that plaintiff or any putative class member is entitled to any relief. But without prejudice to its defenses in this action, PPI avers that the amount in controversy exceeds the \$5,000,000 threshold for removal jurisdiction under CAFA, 28 U.S.C. section 1332(d)(2), based on the following:

a. Plaintiff seeks to represent “all persons injured as a result of exposure to the hepatitis A Virus (hereinafter ‘HAV’) in contaminated ‘Townsend Farms Organic Anti-Oxidant Blend’ manufactured, distributed, and sold by the Defendants.” (Ex. 1 ¶ 6.) “The Product was manufactured, distributed, and sold by Defendants through Costco stores in Nevada and other states.” (*Id.*)

b. Class members are all persons, across the world—regardless of residence—who allegedly “(1) were required, for public health and personal safety reasons, to obtain a vaccination against HAV, or who received a prophylactic dose of immune globulin (IG), due to their exposure in the manners set forth in the preceding paragraph, or (2) underwent serology or other diagnostic testing procedures to determine whether exposure to the Defendants’ contaminated product had resulted in infection by HAV.” (*Id.* ¶ 7.) There are no exclusions from this group. *Id.* Thus, as pled, the putative class encompasses persons asserting personal injury claims—including persons filing the individual actions discussed below.¹

c. “More than 10,000 people have received the vaccine from Costco pharmacies alone, according to Craig Wilson, Costco’s vice president of quality assurance and food safety.” James Andrews, *Thousands Sought Vaccines Following Townsend Farms Hep A Outbreak*, FOOD SAFETY NEWS (June 24, 2013). The putative class also includes people who: (1) received vaccinations after June 24, 2013; (2) received vaccinations at places other than Costco; (3) received prophylactic doses of IG; (4) underwent serology testing; and (5) underwent “other diagnostic testing procedures.” Particularly as Costco “sold 330,000 bags of the recalled product” (*id.*), it is more likely than not that significantly more than 10,000 persons fall within the putative class asserted by plaintiff. (*See also* Ex. 1 ¶ 9 (plaintiff agreeing that “the number of potential class members may be in excess of 10,000”).)

d. On behalf of each of these more-than-10,000 persons, plaintiff claims “general and special, incidental and consequential damages” which “include, but are not limited to: damages for wage loss; medical and medical-related expenses; travel and travel-related expenses; emotional distress; fear of harm and humiliation; physical pain; physical injury; and all other ordinary,

¹ This same, worldwide putative class—alleging exactly the same purported causes of action—is pled in class actions filed in California (United States District Court, Central District of California) (*Petersen v. Townsend Farms, Inc.*, No. SA CV-01292-DOC (JCGx)); Hawaii (United States District Court, District of Hawaii) (*Caldwell v. Townsend Farms, Inc.*, No. 13-00408 RLP); Idaho (United States District Court, District of Idaho) (*Berndt v. Townsend Farms, Inc.*, No. 13-cv-00388-CWD); Colorado (United States District Court, District of Colorado) (*Faber v. Townsend Farms, Inc.*, No. 13-cv-02423- RBJ); New Mexico (Second Judicial District Court, County of Bernalillo) (*McConaghy v. Townsend Farms, Inc.*, No. D-202-CV-2013-04991); Oregon (Circuit Court, County of Multnomah) (*Straka v. Townsend Farms, Inc.*, No. 1306-08425); and Washington (King County Superior Court) (*Sewards v. Townsend Farms, Inc.*, No. 13-2-22482-8 SEA). One of the reasons PPI seeks removal to federal court is to make coordination or consolidation feasible through the JPML or other mechanisms across state lines.

incidental and consequential damages as would be anticipated to arise under the circumstances.” (*Id.* ¶ 48.) The Class Action Complaint also seeks attorneys’ fees. (*See id.* Prayer (2); Notice of Removal ¶ 17.j, *infra* (explaining why such amounts should be considered in the amount in controversy for removal purposes).)

e. Even if one were to conservatively account for only 10,000 putative class members, the \$5 million amount in controversy requirement would be met at an average in-controversy value of \$500 per class member. The evidence surpasses that sum, and it is more likely than not that the amount-in-controversy requirement is met.

f. For example, these same plaintiffs’ counsel now have filed at least six non-class cases. In each of these cases, these plaintiffs’ counsel seek the same measures of damages and fees discussed in sub-paragraph d., above. In at least one of the cases, plaintiffs’ counsel asserts that the valuation of such claims is in excess of \$75,000 per plaintiff. (RJN Ex. 2 (*Echard* Compl. ¶ 3).) Other counsel asserting similar claims also have asserted a valuation of such claims in excess of \$75,000 per plaintiff. (RJN Ex. 3 (*Norman* Compl. ¶ 6).)

g. As further evidence that the average per-member amount in controversy exceeds \$500—and the aggregate thus exceeds \$5 million—numerous other individual cases, asserting the same or similar claims for damages and fees, have been filed in courts with jurisdictional minimum amount-in-controversy requirements of \$25,000. (*See* RJN Exs. 4 (*Favero* Cover Sheet & Compl.); 5 (*Soza* Cover Sheet & Compl.), 6 (*Gunn* Cover Sheet & Compl.); 7 (*Commerford* Compl. Caption (“Civil – Unlimited”); *see, e.g.*, Cal. Civ. Proc. Code §§ 86, 88; *see also Rad v. Townsend Farms, Inc.*, No. CV2013-008589 (Maricopa County Superior Court, Arizona) (Ariz. Rev. Stat. § 12-123 (\$10,000)); *Walters v. Townsend Farms, Inc.*, No. 13CV30211 (Arapahoe County District Court, Colorado) (Colo. Rev. Stat. Ann. § 13-6-104 (\$15,000)); *Brothers v. Townsend Farms, Inc.*, No. 13-2-05597-8 (Snohomish County Superior Court, Washington) (Wash. Rev. Code § 7.06.020 (\$50,000)).)

h. In settlement of a separate incident involving exposure to the same virus alleged in this case, Plaintiff’s counsel received \$36,551 on behalf of each of 29 persons claiming HAV issues as a result of eating contaminated food at two local Subway sandwich restaurants in Seattle,

Washington. *See* Press Release, Seattle Law Firm Obtains \$1.06 Million Settlement on Behalf of Hepatitis Outbreak Victims (August 14, 2000), http://www.marlerclark.com/press_releases/view/seattle-law-firm-obtains-106-million-settlement-on-behalf-of-hepatitis-outh.

i. The evidence cited above establishes that it is more likely than not that at least \$75,000 per person is the amount in controversy under Plaintiff's claims. Of course, at \$75,000 per person, for each of (at least) 10,000 persons, the amount in controversy greatly exceeds the conservative \$500 per-person average CAFA's threshold requires.

j. Courts also consider attorneys' fees in establishing the amount in controversy for removal jurisdiction under the CAFA amendments. *See, e.g., Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001); *Lim*, 2012 U.S. Dist. LEXIS 12871, at *9 (fees are calculated at 25% of the potential damage award). Given the foregoing, the addition of attorneys' fees further increases Plaintiff's claimed amount in controversy well over the \$5,000,000 jurisdictional threshold.

REMOVAL IS ALSO PROPER BASED ON DIVERSITY OF CITIZENSHIP

18. Removal is proper and diversity jurisdiction exists over this action under 28 U.S.C. § 1441 because this case could originally have been filed in this Court pursuant to 28 U.S.C. § 1332. This action is between citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

19. Complete diversity of citizenship exists between plaintiff and defendants, each of whom are citizens of different states. 28 U.S.C. § 1332(a)(1); Notice of Removal *supra* ¶¶ 12-14 (Townsend is a citizen of Oregon, PPI is a citizen of California, and Plaintiff is a citizen of Nevada).

20. The matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a); Notice of Removal *supra* ¶ 17.d, f, h, j (damages in individual actions with identical claims for damage alleged to be greater than \$75,000 threshold).

28 U.S.C. § 1446 REQUIREMENTS

21. **Removal Is Timely.** PPI timely filed this Notice of Removal, within 30 days of service of the Class Action Complaint. *See* 28 U.S.C. § 1446(b). One year has not elapsed from the date the action in state court commenced. *See* 28 U.S.C. § 1446(c).

22. **Removal to This Court Is Proper.** The Class Action Complaint was filed in the District Court, Clark County, Nevada. This Court is part of the “district and division within which such action is pending” 28 U.S.C. § 1446(a); 84(c).

23. **Pleadings and Process.** Pursuant to 28 U.S.C. section 1446(a), a “copy of all process, pleadings, and orders served upon” PPI is attached to this Notice of Removal as Exhibits 1, 2, and 3. PPI has not answered or otherwise filed a response to the Class Action Complaint. Other than the documents attached as Exhibits 1, 2, and 3, no other pleadings, process, orders, or other papers in this case have been filed, served, or otherwise received by defendants.

24. **Notice to All Parties and the State Court.** Concurrent with the filing of this Notice, PPI gave written notice of this Notice of Removal to Plaintiff’s counsel of record, and will file a copy of this Notice of Removal with the Clerk of the District Court, Clark County, Nevada. 28 U.S.C. § 1446(a), (d).

WHEREFORE, notice is given that this action is removed from the District Court, Clark County, Nevada, to the United States District Court for the District of Nevada.

RESPECTFULLY SUBMITTED this 20th day of September, 2013.

McDONALD CARANO WILSON LLP

By: /s/ Amanda C. Yen

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LVD0CS-#287541-v1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP, and that on the 20th day of September, 2012, a true and correct copy of the foregoing **NOTICE OF REMOVAL OF CIVIL CTION UNDER 28 U.S.C. §§ 1332(D), 1441, 1446 & 1453 (CLASS ACTION FAIRNESS ACT) AND 28 U.S.C. § 1332(A) (DIVERSITY)** was electronically filed with the Clerk of the Court by using CM/ECF service which will provide copies to all counsel of record registered to receive CM/ECF notification in the captioned case.

/s/ Della Sampson

An employee of McDonald Carano Wilson LLP